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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

SUBRAMANIAM BALASUBRAMANIAN, Petitioner, v. LOS ANGELES COUNTY SUPERIOR COURT, Respondent; COUNTY OF LOS ANGELES et al., Real Parties in Interest.	B151353 (Los Angeles County Super. Ct. No. BC158506)

Petition for writ of mandate. David Workman, Judge. Writ granted.

Kiesel, Boucher & Larson and Patrick DeBlase for Petitioner.

No appearance for Respondent.

Lester L. Jones, Brandie N. Charles and Littler Mendelson for Real Party in Interest Charles R. Drew University of Medicine and Science.

Law Offices of Hausman & Sosa, Jeffrey M. Hausman and Larry D. Stratton for Real Party in Interest County of Los Angeles, Department of Health Services.

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Petitioner, Subramaniam Balasubramanian, seeks a writ of mandate directing the superior court to vacate its order of May 9, 2001, setting aside a ruling and order of a general referee granting petitioner's Code of Civil Procedure section 170.6[1] motion for peremptory challenge. We grant the writ.

I. FACTS

In 1996, petitioner filed suit against real parties in interest[2] seeking recovery of damages for racial discrimination. In 1997, the parties agreed to refer this case to a general referee for trial and decision. Robert R. Devich (retired Associate Justice of the Court of Appeal), was appointed as general referee pursuant to section 638, subdivision (1). Following trial, he issued a statement of decision. Petitioner appealed, and on January 25, 2000, this court reversed the decision and remanded the case to the trial court.[3]

On January 25, 2001, a remittitur issued. On February 20, 2001, the trial court set a trial setting conference to be held on February 26, 2001. A few days

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[2] Real parties are the County of Los Angeles (sued as County of Los Angeles, Department of Health Services), Martin Luther King/Drew Medical Center and Charles R. Drew University of Medicine and Science.

[3] The January 25, 2000 opinion provides as follows: "The matter is reversed and remanded with directions to the trial court to apply the doctrine of res judicata and to find in favor of [petitioner] with respect to the issue of employment discrimination in accordance with the views expressed in this opinion. The trial court is ordered to try the matter on the issue of damages incurred by [petitioner]." This language cannot, as petitioner contends, be read to mean that this court specifically instructed the trial court to try the issue of damages. Because the parties had agreed to have the matter heard by a general referee, we interpret the language to mean that the remand was to the trial court, and that the trial court would, pursuant to the stipulation of the parties, refer the matter to the general referee who originally tried the matter.

prior to the trial setting conference, real parties in interest County of Los Angeles (County) and Charles R. Drew University of Medicine and Science (University) filed briefs with the trial court advocating that the case be remanded to Justice Devich for trial. Petitioner objected to this proposal. On February 26, 2001, the trial court ordered that Justice Devich try the matter within 90 days. On February 28, 2001, petitioner filed a section 170.6 peremptory challenge challenging Justice Devich.

In addition to the section 170.6 affidavit, petitioner filed a motion seeking an order stating that the trial court, rather than the general referee, would try the issue of damages. The motion was opposed by real parties in interest. A hearing was held on March 23, 2001. The trial court informed the parties that the motion had been taken off calendar by the court.[4] Petitioner then renewed the motion before Justice Devich. On April 6, 2001, Justice Devich issued a statement of decision and order granting petitioner's motion on the grounds that "[t]he [petitioner] has factually and legally complied with the provisions of Code of Civil Procedure, section 170.6."

Justice Devich's statement of decision and accompanying order were forwarded to the trial court. On May 9, 2001, instead of adopting the statement of decision, the trial court issued a minute order refusing to adopt the statement of decision and striking petitioner's peremptory challenge.[5] This petition, filed July 6, 2001, followed.

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[4] The court's minute order reads as follows: "The motion is ordered off calendar without prejudice to renew it before the referee, on the grounds that the challenged judge must rule on the peremptory challenge. [2 Witkin, Cal. Procedure (4th ed. 1996) Courts, § 141(2), p. 187.]"

[5] The minute order states as follows: "The Court treats the general referee's statement of decision, which pertains to a collateral, post-trial issue, as being advisory. [Code Civ. Proc., § 644, subd. (b).] [¶] The Court does not adopt the statement of decision. Instead, the Court orders that [petitioner's] motion is denied,

II. ISSUES

Petitioner claims the petition for writ of mandate is timely, he was entitled to file a peremptory challenge against the general referee, the trial court acted in excess of its authority in setting aside the general referee's ruling granting petitioner's section 170.6 motion for peremptory challenge, the doctrine of laches does not apply, and the time limits under the Trial Court Delay Reduction Act dos not apply.

III. DISCUSSION

A. The petition for writ of mandate was timely.

Real parties, citing *Grant v. Superior Court* (2001) 90 Cal.App.4th 518 (*Grant*), claim that because petitioner's writ of mandate was filed 58 days after the trial court's May 9, 2001 ruling, the petition is untimely pursuant to section 170.3, subdivision (d) which provides that an order granting or denying a peremptory challenge may be reviewed only by way of a petition for writ of mandate filed within 10 days of notice to the parties of the decision. (*Id*. at p. 523.)

Grant is distinguishable. There, a peremptory challenge was denied by the trial court, and a writ was filed seeking to overturn the denial. (*Grant, supra,* 90 Cal.App.4th at pp. 522-523.) Petitioner does not seek to overturn the ruling issued by the general referee -- because that ruling *granted* petitioner's peremptory challenge. Petitioner seeks a writ directing the *trial court* to set aside its order overturning the general referee's order granting petitioner's peremptory challenge. We conclude therefore that the writ filed by petitioner is a nonstatutory, common law writ, subject only to equitable deadlines.

"Courts generally expect petitions for nonstatutory common law writs (or any writ where there is no statutory time limit) to be filed no later than *60 days* after

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and his peremptory challenge to the general referee filed February 28, 2001, is stricken, on the ground of implied waiver."

entry of the challenged order. However, appellate courts have discretion to hear writ petitions beyond the 60-day period." (Eisenberg, Horvitz & Wiener, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2000) ¶ 15:146, p. 15-67, citing *Planned Parenthood Golden Gate v. Superior Court* (2000) 83 Cal.App.4th 347, 356-357.)

The general referee issued his ruling granting petitioner's peremptory challenge on April 6, 2001. The trial court's order overturning the general referee's order did not issue until May 9, 2001. This petition was filed on July 6, 2001, 58 days after the May 9, 2001 order issued. We conclude, therefore, that the petition was timely filed within the 60-day rule set forth above.

B. Petitioner was entitled to file a peremptory challenge against the general referee.

We next consider whether a general referee can be challenged pursuant to section 170.6. That section provides, in pertinent part, as follows: "(1) No judge, court commissioner, or referee of any superior or municipal court of the State of California shall try any civil or criminal action or special proceeding of any kind or character nor hear any matter therein that involves a contested issue of law or fact when it shall be established as hereinafter provided that the judge or court commissioner is prejudiced against any party or attorney or the interest of any party or attorney appearing in the action or proceeding. [¶] (2) Any party to or any attorney appearing in any such action or proceeding may establish this prejudice by an oral or written motion without notice supported by affidavit or declaration under penalty of perjury or an oral statement under oath that the judge, court commissioner, or referee before whom the action or proceeding is pending or to whom it is assigned is prejudiced against any such party or attorney or the interest of the party or attorney so that the party or attorney cannot or believes that he or she cannot have a fair and impartial trial or hearing before the judge, court commissioner, or referee. . . . [¶] A motion under this paragraph may be made

following reversal on appeal of a trial court's decision, or following reversal on appeal of a trial court's final judgment, if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter. Notwithstanding paragraph (3) of this section, the party who filed the appeal that resulted in the reversal of a final judgment of a trial court may make a motion under *this section* regardless of whether that party or side has previously done so. The motion shall be made within 60 days after the party or the party's attorney has been notified of the assignment." (Italics added.)

It is clear that referees were contemplated as judicial officers who could be challenged because they are specifically listed in subdivision (1) of section 170.6. The reference to "this section" in the last paragraph of subdivision (2) applies to the entirety of section 170.6. This being so, petitioner had the right to challenge Justice Devich as the referee who tried the case, found against petitioner, and was reversed on appeal.

C. The trial court acted in excess of its authority in treating the general referee's ruling as an advisory decision.

Petitioner claims the trial court acted in excess of its authority in treating the general referee's decision to grant petitioner's peremptory challenge as an advisory decision. We agree.

The trial court deemed petitioner's disqualification motion to be a "collateral, post-trial issue" governed by section 644, subdivision (b), and found that the referee's decision to grant the motion was, therefore, "advisory." We conclude the trial court erred in so finding.

Ordinarily, issues of fact must be tried by a jury, or a judge where a jury trial has been waived. (§ 592.) However, the trial court may order trial by a referee "upon the agreement of the parties filed with the clerk, or judge . . . ." (§ 638.) The court may order either a general or special reference depending upon the parties' agreement. A general reference has binding effect. It empowers the referee "[t]o

hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision thereon." (§ 638, subd. (a).) A special reference is simply advisory. It empowers the referee "[t]o ascertain a fact necessary to enable the court to determine an action or proceeding." (§ 638, subd. (b).)

Section 644 spells out the effect of the referee's decision. Subdivision (a) provides: "In the case of a consensual general reference pursuant to Section 638, the decision of the referee . . . upon the whole issue must stand as the decision of the court, and upon filing of the statement of decision with the clerk of the court, or with the judge where there is no clerk, judgment may be entered thereon in the same manner as if the action had been tried by the court." Subdivision (b) provides: "In the case of all other references, the decision of the referee . . . is only advisory. The court may adopt the referee's recommendations in whole or in part after independently considering the referee's findings and any objections and responses thereto filed with the court."

The language of section 644 is plain. Once the parties have stipulated to a consensual general referee, and such a reference has been ordered, that referee is charged with deciding the entire matter, including collateral issues.

Real party County's reliance on *Harris v. S. F. S. R. Co.* (1871) 41 Cal. 393 (*Harris*) and *Chiarodit v. Chiarodit* (1933) 218 Cal. 147 (*Chiarodit*) is misplaced. These cases involve the appointment of a referee to determine collateral issues. They did not involve a general reference wherein the parties agreed to have the referee hear and determine the entire matter. In *Harris*, the referee's duties were '"to take the account of the profits, increase, and dividends of said stock belonging to plaintiff"' (*Harris, supra*, 41 Cal. at p. 403.) In *Chiarodit*, the parties did not stipulate to the appointment of a referee to try the whole case; the referee's authority was limited to evaluating collateral factual issues that would assist the

court in the determination of a divorce proceeding. (*Chiarodit, supra,* 218 Cal. at p. 149.)

Section 644, subdivision (a) provides that the decision of the referee "upon the whole issue" is to be the order of the trial court. Review of a general referee's determination is not to be made by the trial court, but in the Court of Appeal. (*Ellsworth v. Ellsworth* (1954) 42 Cal.2d 719, 722.) The purpose of appointing a consensual general referee pursuant to section 644, subdivision (a) is to have an alternative forum, with the full authority of the trial court, to try a matter. The record reflects that Justice Devich was a general referee. Accordingly, his decision to grant petitioner's section 170.6 motion should have been accepted by the trial court and attacked as though it were made by the trial court.

D. The doctrine of laches does not apply.

Real party County claims that the doctrine of laches applies because petitioner "took approximately sixty (60) days to file the within petition, notwithstanding prior knowledge of orders entered by [the trial court] requiring that the trial of this matter before [the general referee] be completed no later than August 7, 2001." In other words, the trial court's order that the matter be tried before the general referee no later than August 7, 2001, somehow establishes prejudice. We disagree. The record reflects that petitioner intended at all times to challenge Justice Devich, and that real parties have always been aware of petitioner's position on this issue. Moreover, Justice Devich specifically stayed any and all proceedings after May 9, 2001, upon the representation of petitioner's counsel that a writ would be sought.

Real parties have failed to show that prejudice has or will result due to the timing of this petition. Accordingly, we conclude that the doctrine of laches is inapplicable.

E. The time limits under the Trial Court Delay Reduction Act do not apply.

Real party County claims that petitioner's section 170.6 motion was untimely under the Trial Court Delay Reduction Act (Govt. Code, § 68616, subd. (i)). We disagree.

Government Code section 68616, subdivision (i) has no application when a judgment has been reversed on appeal and returned to the trial court for retrial. (*Stubblefield Construction Co. v. Superior Court* (2000) 81 Cal.App.4th 762, 769.)

Within two days of the date the case was remanded by the trial court to Justice Devich, petitioner filed a peremptory challenge affidavit and motion. The trial court ordered the "remand" on February 26, 2001, and petitioner challenged Justice Devich on February 28, 2001. Petitioner filed his peremptory challenge well within the 60-day deadline even if the clock began ticking on the date this court issued its remittitur on January 30, 2001.

IV. DISPOSITION

The alternative writ is discharged and the stay is dissolved. Let a peremptory writ of mandate issue directing the respondent trial court to vacate its May 9, 2001, order overturning the general referee's order granting petitioner's section 170.6 peremptory challenge, and issue a new and different order reinstating the general referee's order granting petitioner's peremptory challenge. The trial court

is further directed to refer trial of the damages in this matter to a referee selected pursuant to section 639. Costs to petitioner.

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_____, P.J.

BOREN

We concur:

_____, J.

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TODD